

EXHIBIT B

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 05-44481-rdd

4 Adv. Case No. 14-02445-rdd

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6 In the Matter of:

7 DPH HOLDINGS CORP., et al.,

8 Debtors.

9 - - - - - x

10 SOLUS ALTERNATIVE ASSET MANAGEMENT LP et al.,

11 Plaintiffs,

12 v.

13 DELPHI AUTOMOTIVE LLP, et al.,

14 Defendants.

15 - - - - - x

16 U.S. Bankruptcy Court

17 300 Quarropas Street, Room 248

18 White Plains, NY 10601

19

20 March 24, 2017

21 12:34 PM

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23 B E F O R E :

24 HON ROBERT D. DRAIN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Pre Trial Conference - Motion for Summary
2 Judgment.

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25 Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

MR. TEECE: Good afternoon, Your Honor. For the record, James Teece and Eric Kay for Solus Alternative Asset Management, De Angelo Gold Funds and the Highland Funds, Plaintiffs.

THE COURT: Good afternoon.

MR. FRIEDMAN: Good afternoon, Your Honor. Edward Friedman and Jeffrey Fourmaux, Friedman Kaplan Seiler & Adelman for the Delphi Defendants.

THE COURT: Good afternoon. Okay, so this is the hearing scheduled for the issue of prejudgment interest, which was touched on towards the end of the summary judgment motion process, but I concluded that I needed more input on it from the parties after my bench ruling. And I appreciate that you have, I believe, although I want to confirm this, confirmed or agreed upon the actual dates when the payments of the unsecured creditor distribution under the plan should have been made under my prior ruling? Obviously, the defendants are reserving their rights in respect of the appeal of that ruling if they want to appeal, but as far as that ruling is concerned, you've agreed on when those payments should have been made?

MR. TEECE: That's correct, Your Honor.

MR. FRIEDMAN: Yes, Your Honor.

THE COURT: Okay, and they're laid out, among

1 other places, in the defendants' opening brief at Page 6, I
2 guess, in the chart. All three payments would have been in
3 2015, March, June and September, in the amounts stated.

4 MR. FRIEDMAN: Exactly right, Your Honor.

5 THE COURT: Okay, so what we're really talking
6 about here, then, is simply the issue of whether prejudgment
7 interest should be payable on those amounts, as of those
8 respective dates, at all and if so, at what rate.

9 MR. TEECE: That's correct, Your Honor.

10 THE COURT: Okay. Now, I've read the parties'
11 pleadings on this. I'm happy to hear you with anything more
12 on that.

13 MR. TEECE: Sure. Again, Your Honor, James Teece
14 for the plaintiffs. The request the plaintiffs have made is
15 for a 9 percent prejudgment rate, and, to be clear, and
16 stated with more precision, our request goes to the Court's
17 discretion and we're requesting the Court exercise its
18 discretion and look to New York law to award the 9 percent
19 rate, which relates to a plan which is governed by New York
20 law, and which has the statute that says that in disputes
21 over contracts, the presumptively appropriate rate is 9
22 percent. To be clear, we are not arguing -- it has been
23 stated many times that our position is that the 9 percent
24 rate is mandatory -- that is not the plaintiffs' position.
25 We're not arguing that it's mandatory.

1 THE COURT: All right.

2 MR. TEECE: We're arguing that the Court -- given
3 that -- the factors that are relevant to the exercise of
4 your discretion, which are exceedingly broad, which include
5 considerations of fairness, relative equities, other general
6 principals, there are very few limitations on the exercise,
7 that given that exercise, the 9 percent rate is appropriate.
8 Now, this action, Your Honor, our complaint has two counts.
9 The first count is for declaratory relief. The second count
10 is for breach of contract. And, in sum and substance, the
11 plaintiffs in this action requested declaratory relief that
12 was consistent with their reading of the plan,
13 implementation of the plan consistent with that reading, and
14 the payment of \$300 million dollars under the plan. In sum
15 and substance, that was the relief that was requested.

16 Defendants, in their brief, described the dispute
17 in a way that we think is appropriate. They said on Page 3
18 of their -- or Page 9 of their answering brief, this is a
19 dispute about commercial actors -- this is a dispute between
20 commercial actors about the meaning of the contract. And
21 that's correct in sum and substance. What it is, there was
22 differing interpretations of a plan, which was a contract
23 governed by New York law. And the action, while there is a
24 declaratory count, which, is by definition, neither legal
25 nor equitable as a procedural vehicle, there's a breach of

1 contract count. The action is neither entirely legal nor
2 entirely equitable, which is why we're arguing that Your
3 Honor should exercise his discretion. We're not arguing
4 that it's a mandatory 9 percent rate, for that reason.

5 But it makes no difference that the action is both
6 legal and equitable because, either way, the Court can get
7 to 9 percent as the appropriate rate. Obviously, if it's
8 entirely legal, this was a breach of contract dispute, the
9 statute applies. But I'd refer the Court to the Lewis case,
10 which is cited by defendants, actually. This is a Second
11 Circuit decision, 831 F.2d 37, and it cited within the
12 defendants' citation to a Rhodes case, which I'll speak to
13 in just a second. This is a Second Circuit case. There was
14 a shareholder derivative suit alleging a waste of corporate
15 assets. The directors of, say, Company A, for simplicity's
16 sake, rented out their office space to Company B, in which
17 the directors also had a significant interest.

18 And the -- a claim -- a shareholder derivative
19 suit was brought for corporate waste. The Second Circuit
20 said -- made the following observation, I'm reading from
21 Page 39: "A derivative action has a dual nature. The
22 derivative mechanism invokes the equitable powers of the
23 court in that a stockholder is allowed to pursue a claim on
24 behalf of his corporation; but to the extent that the claim
25 itself would be viewed as one in law rather than in equity

1 if asserted by the corporation itself, the action may
2 properly be viewed as one of a legal nature." It then went
3 on to determine that the plaintiffs were entitled to 9
4 percent under the CPLR, because what it said is, and I'm
5 reading from Page 41 now, whether the claim would "be viewed
6 as a legal one for interference with SFE's enjoyment,"
7 that's the corporation, "of its property or as an equitable
8 one because the derivative mechanism was used, the District
9 Court should have awarded SFE prejudgment interest. We
10 believe that they were entitled to it as a matter of right."

11 So our point is, Your Honor, is whether -- this
12 may be a dual case where we have a declaratory relief and a
13 request to implement the plan under 1142, and a breach of
14 contract action, given that the Court reviewed the contract
15 under New York law, examined the context within which the
16 contract came to fruition through the bankruptcy
17 confirmation process, under New York law, and the 9 percent
18 rate can be avoided -- can be awarded, rather, either way.

19 And by analogy, Your Honor, we cite a number of
20 cases where only Federal claims are asserted. No state law
21 breach of contract claims. And this is the Alfano case that
22 we cite, the Dow Chemical case that we cite, the Livenet
23 case, Lehman Brothers Holdings, these are cases where only
24 Federal claims are asserted and the Court, on the question
25 of prejudgment interest, looks to the New York CPLR in the

1 exercise of its discretion, and it awards 9 percent. I
2 think Alfano is especially instructive. This is an ERISA
3 benefits case at 2009 WL 890626, a request for long-term
4 benefits. Claimant made the request, for three years the
5 request was pending. Ultimately, the claimant prevailed,
6 and the claimant got 9 percent. And if you think about it,
7 that's a very similar situation because ERISA is Federal
8 statute, and in essence, while they're arguing that the plan
9 entitled the claimant to benefits, there's a level of
10 injunctive relief that's wrapped up in that request because
11 you have to compel the plan to pay you your benefits.

12 So, we think that these cases are very similar to
13 our case in that it doesn't matter that it's not exclusively
14 a state law breach of contract claim, doesn't matter that
15 there's an element of Federal law. The 9 percent rate can
16 be awarded. Again, the Dow Chemical case, this is a COGSA,
17 Carriage of Goods by Sea Act, case. The vessel was diverted
18 to another port, the Court awarded 9 percent instead of
19 just, you know what? Exceptional circumstances, we'll award
20 9 percent under the CPLR. Livenet was a securities fraud
21 case, 9 percent under the New York CPLR. Lehman Brothers
22 was a declaratory judgment action arguing that Bank of
23 America violated the automatic stay by setting off against
24 funds that were supposedly in a special purpose account, to
25 satisfy all of this exposure. We think those cases apply by

1 analogy. The defendant --

2 THE COURT: There are plenty of cases applying
3 Federal law, though, that, contrary to those cases, apply
4 either the Federal postjudgment rate, by analogy, or, as in
5 the case with the 1031 opinion by Judge Glenn, the prime
6 rate in effect at the time. And other than a few remarks
7 like the one Judge Glenn made, which is that the T-bill rate
8 just seemed too low, courts don't really explain in any
9 great detail why they choose one rate over another.

10 MR. TEECE: May I respond to that?

11 THE COURT: Yeah.

12 MR. TEECE: So, let's take the 1031 --

13 THE COURT: I mean, they list the factors, but
14 they don't really, based on my review, spend a lot of time
15 analyzing the rates in light of those factors.

16 MR. TEECE: Well, there are -- I'll speak to -- I
17 want to talk about the 1031 case first because that case,
18 where Judge Glenn doesn't apply the CPLR, but he sets the
19 rate at between 6 and 8.25 percent.

20 THE COURT: Well, he applies the prime rate.

21 MR. TEECE: He does, and that's the prime rate at
22 the time.

23 THE COURT: Right.

24 MR. TEECE: There are myriad cases cited by
25 defendants which have Chapter 5 claims. These are pure

1 Federal claims as well. They reflexively apply the Federal
2 judgment rate.

3 THE COURT: Right.

4 MR. TEECE: Okay? And those cases, Colonial Wil -
5 -

6 THE COURT: And maybe there's a distinction
7 between those cases where, you know, we all -- you all, I'm
8 sure, still do, tell our clients, there's nothing wrong with
9 taking a preference. There's nothing improper. You don't
10 want to discourage people from taking preferences. You do
11 want to discourage people from violating the automatic stay
12 or sending a ship where it's not supposed to go. So, maybe
13 that's behind the difference, I don't know. You tell me.

14 MR. TEECE: Well, the ca -- on the Federal
15 judgment rate cases, with respect to the preference, the
16 fraudulent transfer claims, if you look at the rates that
17 are awarded, the dates of the cases that are cited, they're
18 -- these are 5 percent rates, okay?

19 THE COURT: Right.

20 MR. TEECE: And my point is that, in different
21 environments, the Federal judgment rate may make more sense,
22 but it makes no sense today, and that is what the defendants
23 are asking for is 50 basis points or 62 basis points, and
24 Your Honor, to your point that the courts don't analyze why
25 they award interest at the rate that they do, I -- some of

1 the decisions that we cited I think do make that analysis.
2 For example, the -- in the Alfano case, the argument was
3 made by CIGNA on the ERISA benefits case that the Treasury
4 rate was too low, and in that case, the Court says, although
5 CIGNA -- and I'm reading from Star 6, I guess, it's a
6 Westlaw decision -- "Although CIGNA argues that the Treasury
7 rate constitutes a more appropriate rate, there is no reason
8 to think that that rate more accurately captures the time
9 value of money in New York, or the true loss to plaintiff,
10 particularly given the New York State Legislature's
11 determination otherwise." Now, the point is that the Court
12 is deferring, in that particular case, to a determination
13 that's made by the Legislature --

14 THE COURT: Right.

15 MR. TEECE: -- and then, in the Schleben case,
16 which is cited by the defendants, this is an Eastern
17 District of Michigan case, 2016 -- 2016 WL 806707. This is
18 an ERISA action, plan amendment reduced the plaintiff's
19 benefits, the plaintiff argued that that violated the plan.
20 The plaintiff asked for 15 percent because they tried to
21 average the returns that they would get under the plan, and
22 the plan asked for the 1 percent Treasury rate. The Court
23 said, quote, "it's unsurprising that during a period marked
24 by low interest rates in the wake of the global financial
25 crisis of 2008, some courts have recognized that the one-

1 year Treasury rate has limited relevance for calculating
2 prejudgment interest." The point is, is that --

3 THE COURT: On the other hand, I think -- well,
4 maybe not a hedge fund manager but a lot of fund managers
5 would be absolutely delighted if they had a 9 percent rate
6 of return in 2015 or 2016.

7 MR. TEECE: But Your Honor, I think that the --

8 THE COURT: I mean, that -- they'd be a hero,
9 wouldn't they?

10 MR. TEECE: I think the point is, is that if you
11 take a legal position, if you advance the legal position
12 based on your reading of the contract, and --

13 THE COURT: Yeah, but they lost on that.

14 MR. TEECE: Right, but there was a risk that -
15 that, in advancing a legal position and having a breach of
16 contract dispute, that a prejudgment interest rate of 9
17 percent would be payable. That's what the statute has said.
18 That's what the Legislature in this jurisdiction says is the
19 rate. If you have an argument about a breach of contract
20 and one party prevails and the other does not, that is the
21 rate that's awarded, and there's no qualitative disclaimer
22 in the statute, Judge Drain. There's no -- the New York
23 CPLR doesn't --

24 THE COURT: No, but we're already saying that the
25 statute is not mandatory. I mean, that's -- that's how you

1 began, so what I'm looking at, and I think what the various
2 courts that you've been citing properly looked at, was
3 whether the 9 percent rate for the period at issue here fits
4 the factors that courts generally say need to be considered
5 under Federal law, i.e., the need to fully compensate the
6 wronged party for actual damages suffered, we need the time
7 value of money here before the money went in the unsecured
8 creditors' pocket, considerations of fairness and the
9 relative equities of the reward, the remedial purpose of the
10 statute involved, and such other general principals as are
11 deemed relevant by the Court.

12 I think we haven't really gotten into remedial
13 purposes or fairness or maybe you're sort of trying to get
14 into it just now, fairness and relative equities, but just
15 focusing on fully compensating the wronged party, again, I
16 mean, 9 percent --

17 MR. TEECE: Well, I'll speak to that, Your Honor.
18 The -- first of all, the Court is entitled, and I cite to
19 the Jones case on this, another case by the defendants, 223
20 F.3d 130, you're entitled to determine if a party could have
21 invested the money at a higher rate than the Treasury rate,
22 and we've attached submissions showing the S&P 500 rate was
23 8.4, the Russell 2000 Index was a little higher than that.
24 So, the money could have been deployed in other ways. The
25 money -- the \$300 million dollars, under the Court's ruling,

1 became due and payable in installments starting on March
2 9th. At that point in time, the money could have been
3 invested. Now, again, the case law says that the 9 percent
4 rate, I'm not arguing that it's mandatory, but it says that
5 it's compensatory and it's not punitive. And so, the
6 position that, well, unless I can get you up to 9 percent,
7 unless I can convince you to exercise your discretion up to
8 9 percent --

9 THE COURT: But again, isn't that really in the
10 same context when people say, at the time, it seems okay, as
11 opposed to it's always okay? Just the same logic that says
12 that the T-bill rate may be fine at some times and not at
13 others because there's some sort of disconnect in the world.

14 MR. TEECE: The statute, Your Honor, if it becomes
15 -- if its application becomes unworkable, for some reason,
16 then I presume the Legislature will amend it, but it's --

17 THE COURT: But we have two different
18 Legislatures. We have the Congress, that says that at least
19 the postjudgment rate is T-bills, and we have the New York
20 State Legislature that says it's 9 percent, so even they
21 don't agree.

22 MR. TEECE: But we're not talking about
23 postjudgment interest only.

24 THE COURT: I know, but a lot of Federal Courts
25 have been perfectly happy to apply it in a prejudgment

1 context, too.

2 MR. TEECE: The only -- I would disagree with that
3 statement only to say -- I don't -- I've only -- I don't
4 believe I've seen the case, or maybe I've seen only one
5 case, where the Judge simply said, you know, this is the
6 postjudgment rate and I'm also just applying it as the
7 prejudgment rate. I don't think so. I think the point is,
8 is that the --

9 THE COURT: They don't spend a lot of analysis.

10 MR. TEECE: -- the Federal judgment rate --

11 THE COURT: I mean, in Lehman Brothers, for
12 example, there was hardly any analysis.

13 MR. TEECE: Well, the --

14 THE COURT: It just said interest, and then the
15 order had the number in it.

16 MR. TEECE: No, but I think Lehman Brothers is
17 worthy of note, Your Honor. That's clearly a declaratory
18 relief action where the Court, using New York law,
19 interpreted a security agreement --

20 THE COURT: Right, but it was for violation of the
21 automatic stay and, clearly, that factor here would go into
22 factor three, the remedial purpose of the statute involved.
23 You know, violating the stay is pretty serious. You don't
24 want to encourage the -- I forget, who was the defendant --

25 MR. TEECE: It was Bank of America, Your Honor.

1 THE COURT: -- you don't want to encourage the
2 Bank of Americas of the world to improperly set off hundreds
3 of millions of dollars when Debtors are in financial
4 trouble.

5 MR. TEECE: But --

6 THE COURT: So, the consequences really should be
7 pretty serious there.

8 MR. TEECE: But now -- Your Honor, they could have
9 been fined, they could have been given -- could have
10 assessed a fine against them. The Court awarded interest as
11 a component of the judgment.

12 THE COURT: Didn't say why, though.

13 MR. TEECE: But -- just, Your Honor, as going back
14 to the point, though, of the first prong, which is what you
15 said, compensate the claimant.

16 THE COURT: Right.

17 MR. TEECE: So, I believe we've introduced, you
18 know, the argument and -- with screenshots of what some
19 equities and debt returns would have been.

20 THE COURT: Right.

21 MR. TEECE: I also note, Your Honor, that --

22 THE COURT: What would -- can I interrupt you?
23 What would the prime rate have been during this period, on
24 an average basis?

25 MR. TEECE: Your Honor, I must say, I don't know

1 the answer off the top of my head. I don't. But what --
2 where I was going with this was, putting aside the equity
3 investment and then the debt index that we cited to, when
4 the money became owing in March, and to the plaintiffs'
5 mind, was not being paid, the plaintiffs, essentially, were
6 lending it to the company because, from and after March 9th,
7 the contingencies to their recovery, the benefit of their
8 bargain was, we have a contingent right to recovery if
9 distribution exceeds \$7.2 billion dollars and that, in point
10 of fact, happened on March 9th. That's not in dispute.

11 And from and after that period, the money became
12 owing and it wasn't paid, and, to that end, it's fair to say
13 that the company was essentially borrowing the money. The
14 company was borrowing money from other noteholders at the
15 same time, at or about the same time. And it was issuing
16 notes, unsecured notes, at different percentages, 4.15
17 percent, 3.1 -- and one issue was a combination 3.15, 4.4,
18 4.25. These are 4 percent numbers for money that is being
19 extended by noteholders that have covenants, that have
20 affirmative protections in their indenture, reps and
21 warranties, things of that nature. And at the same time,
22 not just in theory, I think, in fact, the -- to the extent
23 that the judgment is unpaid during that period of time, it's
24 a form of a loan to the company, so there's another -- we
25 could have been noteholders of the company and gotten those

1 returns during that period.

2 Now, with respect to the other factors that Your
3 Honor mentioned, the -- at the last hearing, Your Honor,
4 observed, well, this is a close call, so it's going to be
5 very difficult for me to, you know, get far beyond -- I
6 don't want to put words in your mouth, but you recognized
7 that -- your view that you thought this was a close call in
8 terms of the readings. But again, that's a point that goes
9 to the merits. When you consider the contract -- that the
10 contract was one under New York law, and you consider the
11 context under which the contracts came into being, which is
12 the confirmation hearing, and the confirmation of the
13 plan. And at the confirmation hearing, to be clear, the
14 defendants argued that they weren't present at the
15 confirmation hearing. I would take issue with that because
16 more precisely, the collective of Tranche DIP lenders were
17 present at the DIP hearing -- or at the confirmation
18 hearing, rather. Their counsel was present, they made an
19 appearance on the record, and the -- they were essentially
20 the members of DIP HoldCo 3, LLC, which was the "company
21 buyer," and ultimately became new Delphi. The members
22 didn't change during that period. Perhaps these entities
23 came into existence, DAL, DAP, after the confirmation
24 hearing, but the ownership remained the same during that
25 period of time.

1 And in the connection with the confirmation
2 hearing, the reading that is being put forth by these
3 defendants, that distributions, for purposes of a threshold,
4 will not include share repurchases, will not include
5 redemptions, they will only include dividends, that was not
6 a reading that was put forth at the confirmation hearing.
7 It was not stated on the record by any party. The evidence
8 that the Court invited the parties to adduce, with respect
9 to the attendant parties at that point in time, did not
10 yield any -- that exercise, that discovery exercise, did not
11 yield any evidence that that reading was in anyone's
12 contemplation at that time. There's no contemporaneous
13 extrinsic evidence of that.

14 So, what's the point here? There are general
15 principles the Court can consider, which go to disclosure,
16 to bankruptcy disclosure. The reading that's being advanced
17 is inconsistent with the disclosures to the Court at the
18 time. The reading being the defendants' position and their
19 interpretation of the contract. And how does that flow
20 through to prejudgment interest? The point is that either
21 it was something that was known at the time and wasn't
22 disclosed, we don't have to go there, but at some point in
23 time, at some point in time, the idea came up to advance a
24 reading of the plan that it's, number one, governed by the
25 distribution definition in the company-buyer operating

1 agreement, number two, that that means that only dividends
2 count.

3 At some point in time, that idea came into
4 existence, that the document should be read that way and
5 that the position of the defendants will be based on that
6 reading of the document. So, that was not consistent with
7 what took place at the confirmation hearing in terms of what
8 was represented to the record, that's not consistent with
9 the evidentiary record that was developed with respect to
10 the contemporaneous evidence of the document. It was a
11 reading that came into existence at some point in time. So,
12 perhaps 2011, I believe defendants say, it might have been
13 at or about this point in time that that reading came into
14 existence. Well, a decision was made to adopt that reading
15 and to advance it for the purpose of not paying the general
16 unsecured MDA distribution when it was demanded. It wasn't
17 even demanded by our plaintiffs, it was demanded previously
18 in connection with the IPL litigation. We understand that
19 issue was litigated.

20 But at least from that point on, this issue was
21 known, that the unsecured creditors' view of the documents
22 differently. The company made a decision that it would
23 persist with this reading of the documents and argue that an
24 alternative interpretation, which was litigated initially
25 once before this Court and then again by us, and New York

1 law was applied. New York law was applied in interpreting
2 the document, New York law was applied in running to ground
3 the competing interpretations of these documents under New
4 York law, and again, we go back to the exercise of your
5 discretion to look to the law that governs the contract, the
6 law that applies to the jurisdiction in cases such as these.
7 Because in essence, again, as the def -- I don't think the
8 defendants dispute this, this was a dispute about the
9 meaning of the contract and two different interpretations.
10 It was decided under New York law.

11 The defendants argue that we can't -- and I don't
12 know -- I don't know how much Your Honor wants me to address
13 this point. I don't want to address it too much. I mean,
14 I'm happy to get into it but it's quite technical, that
15 because DPH Holdings was the only party -- this is the
16 defendant's position -- because DPH Holdings was the only
17 party that has standing to enforce the MDA, we don't really
18 have a contract claim here, so it's for some -- I'll just
19 read directly --

20 THE COURT: But -- I -- look, to me, given that
21 you opened by saying that application of New York law's 9
22 percent rate is not mandatory, I don't think we need to get
23 into that.

24 MR. TEECE: Okay, I don't -- I just don't -- I
25 want it to be clear that our position --

1 THE COURT: I think you're basically saying that
2 it would be fair to apply New York law because there's a New
3 York context to this, but it's not mandated because it's not
4 really -- because it's a Federal question, ultimately.

5 MR. TEECE: Okay. But to be clear, the only point
6 I wanted to make, Your Honor, was that if, again, it's not
7 mandatory, that is the argument we're making, but if Your
8 Honor wanted -- I don't want to leave unresponded the idea
9 that our clients don't have direct contractual claims under
10 the plan, because they do, because the company buyers
11 defined as DIP HoldCo 3, LLC, the dispersing agent defined
12 as DIP HoldCo 3, LLC, we have claims under the plan. But if
13 -- we're not arguing that it's mandatory because it's a
14 breach of contract case, so we can move off of that.

15 THE COURT: Okay.

16 MR. TEECE: The narrative, I think, that the
17 defendants have tried to construct, and Your Honor touched
18 on a little bit was, that the 9 percent rate is a punitive
19 rate, that there's something punitive about awarding the
20 rate in this particular environment, but that is an issue
21 that's been submitted to courts, and the courts have
22 rejected, saying that the 9 percent rate is a compensatory
23 rate, and not one that is designed to punish people. It's
24 just the rate that has been determined to properly
25 compensate people in a breach of contract case.

1 THE COURT: I don't think they ever used the word
2 "punitive." I think just state -- just say it's not --
3 under this context, it's not reasonable. I mean, clearly, a
4 9 percent rate isn't a punitive rate. If it were the case,
5 then people would never get paid default interest under 506
6 of the Bankruptcy Code, for example.

7 MR. TEECE: I think the point is that --

8 THE COURT: It's not a penalty rate. Put it that
9 way.

10 MR. TEECE: I thought that --

11 MR. FRIEDMAN: I think at some point, Your Honor,
12 in the briefing, we might have characterized 9 percent in
13 these circumstances as a punitive rate in this environment.

14 THE COURT: Well, the issue is whether it's
15 properly compensatory under all the facts.

16 MR. TEECE: Right. It --

17 MR. FRIEDMAN: Correct.

18 MR. TEECE: -- it is on -- I'm reading on Page 9
19 that it's punitive --

20 THE COURT: Okay.

21 MR. TEECE: -- that Plaintiffs assert that the
22 interest is a punitive 9 percent rate -- the point, Your
23 Honor, is that --

24 THE COURT: Well, I don't think of it as punitive,
25 I mean, but I don't think that's really the issue. I don't

1 think, you know, it's hard to argue that any rate chosen by
2 a Legislature is an unenforceable penalty. On the other
3 hand, it may not be the rate that one should apply in
4 exercising the broad discretion that Federal trial courts
5 are given.

6 MR. TEECE: But the problem -- Your Honor, the
7 issue we have of the description of the rate as punitive is
8 not just that courts have found this compensatory and not
9 punitive. It's that it changes the narrative to arguing
10 that the plaintiffs somehow have to show that defendants
11 acted in bad faith for us to get up to 9 percent.

12 THE COURT: No, I mean, I don't think that's
13 right.

14 MR. TEECE: But the defendants' briefs are replete
15 with the argument that defendants have done nothing wrong,
16 defendants prosecuted a legal position in good faith.
17 That's -- okay, we're not arguing the defendants acted in
18 bad faith. But, even when you prosecute a theory in good
19 faith, and you don't prevail, 9 percent is awarded. This
20 J.K. Walkden, Ltd. case v. Lord & Taylor, Your Honor, 2000
21 WL 36266046, this is a case, I believe we cited. This is a
22 9 percent rate, albeit under conversion, statutorily CPLR,
23 the rate for conversion. There was a licensing agreement
24 for the sale of furs, it was Lord & Taylor department store.
25 It's an argument over how the fees should be allocated and 9

1 percent interest was awarded and the Court made the
2 following observation: "Although the jury determined Lord &
3 Taylor was liable for conversion, the jury made no finding
4 that Lord & Taylor acted without the good faith belief that
5 it was entitled to the monies it retained as payment for
6 Ferrari's expenses, even if it was not, in fact, entitled to
7 retain the proceeds." The point is, even if you, in good
8 faith, advance a theory, if you don't prevail, CPLR applies
9 and the rate is set by the statute.

10 THE COURT: No one really knows what the prime
11 rate was for this period? Okay.

12 MR. FRIEDMAN: The prime rate was about 3.25
13 percent.

14 THE COURT: Okay. Now, I appreciate it's a
15 different context, but there is similar language in some of
16 these cases. In your discussion about the loans that were
17 made to the company buyer, DPH, during this period, you
18 know, reflect the credit risk of DPH. I mean, why don't I
19 apply the prime rate plus a point or a point and a half,
20 consistent with Till? I mean, that's -- that's a risk-free
21 rate adjusted to reflect this Debtor. Maybe it wouldn't
22 need to be adjusted at all. Maybe it's just the prime rate.
23 Maybe adjust it by a point.

24 MR. TEECE: Well, it --

25 THE COURT: But, you know, you're going to get the

1 money. It's going to be paid. There's no question it's
2 going to be paid, subject to a stay pending appeal. So, why
3 shouldn't it be the prime rate?

4 MR. TEECE: Your Honor, the point I was making
5 about the money that was loaned, to answer your question is,
6 I respectfully submit that that would be the floor, in the
7 sense that the people who were to be paid those coupons,
8 they had a contract in place that gave them a host of
9 protections --

10 THE COURT: Right.

11 MR. TEECE: -- and so --

12 THE COURT: But you're going to get paid.

13 MR. TEECE: Well, but the point is, is that --

14 THE COURT: You're going to get paid faster than
15 they will.

16 MR. TEECE: The Court is entitled to look at how
17 it would have invested the money. I could have been a
18 noteholder of Delphi during that period and --

19 THE COURT: Well, should I also ask whether they
20 bought the unsecured debt at less than 100 cents on the
21 dollar?

22 MR. TEECE: No, I don't --

23 THE COURT: (Laughs) Just asking, should I ask
24 whether the company buyers people bought the debt for less
25 than 100 cents on the dollar?

1 MR. TEECE: I'm sorry --

2 THE COURT: I mean, I would be more sympathetic to
3 that argument, I guess, if it was an original holder. On
4 the other hand, if it's a hedge fund, isn't that kind of a
5 flipside to the argument that they'd be making more money if
6 they had the money, that they probably are also, therefore,
7 making money that -- just on the fact that they bought the
8 debt at a discount?

9 MR. TEECE: I think, Your Honor, if you want to --
10 if the analysis goes into what money would they have made,
11 had they had the money, we've put in evidence about equity
12 indices and debt indices during that period of time. I've
13 also pointed to the interest rates that the company paid its
14 own unsecured creditors, which were better situated, I
15 respectfully submit, they had protections in their
16 documents, than our clients who, by definition, were just
17 lenders at that point in time. So, the rates that are set
18 by the indenture of Delphi notes, we respectfully submit,
19 are the floor.

20 THE COURT: Okay.

21 MR. TEECE: I want to talk briefly about the
22 Rhodes case, because I suspect that it may come up. The
23 Rhodes case is the one that is prominently featured in the
24 defense brief. I might argue that it's, perhaps, their
25 central case. Rhodes is -- was a breach of contract case.

1 The parties settled the case and entered into a stipulation
2 of dismissal, and when they went forward to execute on the
3 stipulation of dismissal, the stipulation of dismissal
4 provided for the transfer of 50 percent interest of the
5 company for \$2.5 million dollars from -- transfer -- at --
6 before the closing on that transaction, the defendant made a
7 \$250,000 down payment and then argued that it wanted all the
8 transfer documents for the securities up front, all the
9 transfer information that would have been necessary, there's
10 a stockholders agreement that it wanted signed.

11 And the defendant said, I'm not going to go
12 forward, not going to pay you the balance until I get these
13 pre-conditions, and the Court said, well, that's beyond the
14 scope of the stipulation of dismissal. The stipulation of
15 dismissal just said, there's going to be a transfer of stock
16 in exchange for money, and there'll be transfer documents
17 executed whenever. There's no -- you're not entitled to
18 argue that's a pre-condition. And then the question of
19 prejudgment interest came up in terms of how much the
20 plaintiff was entitled because it didn't get the money, and
21 the Court simply said, it cites a series of specific
22 performance cases, which are New York State cases involving
23 parcels of real estate, and it says, to the extent that this
24 was in the nature of specific performance, the Court has
25 broad equitable discretion to set the rate, and the Second

1 Circuit just remanded the case back to the trial court for a
2 determination of the rate.

3 And it said, the rate's not mandatory. So, to
4 that end, Rhodes is not really controverted by us. We don't
5 disagree that, in an equitable case or even a specific
6 performance case, which this case is not, it's close, it's
7 an injunctive case, the 9 percent rate is not mandatory. I
8 think it's telling that, on remand, before Judge Daniels,
9 the parties actually settled the lawsuit, and they
10 negotiated, and the negotiated resolution, they negotiated a
11 5.5 percent rate for prejudgment interest on remand, in that
12 specific performance case, and that agreement appears at ECF
13 No. 171, and that's Case No. 08-9681 for the Southern
14 District of New York. So, even through consensus, without
15 the Court imposing a rate, the parties arrived at 5.5
16 percent.

17 THE COURT: And what was the date of that
18 settlement or that decision that recorded the settlement?

19 MR. TEECE: I have a copy of it with me, Your
20 Honor, I'm happy to hand it to you. I'll give you the date
21 in a second. I believe it's (indiscernible). The order was
22 entered March 28th, 2016, and I have a copy, if Your Honor
23 would like it.

24 THE COURT: And so --

25 MR. TEECE: This is --

1 THE COURT: -- rates have gone up a little bit,
2 then, right? This is from 2015?

3 MR. TEECE: No, Your Honor, this is dated March
4 11th, 2016. Oh, I -- oh, okay, I'm sorry.

5 THE COURT: So, rates have gone up since 2015.

6 MR. TEECE: (Indiscernible) Your Honor --

7 THE COURT: Maybe half a point, quarter of a
8 point, I don't know. Isn't that what -- how rates have gone
9 up since then?

10 MR. TEECE: But --

11 THE COURT: And it was \$2 million dollars was at
12 issue?

13 MR. TEECE: \$2.5 million dollars, so 5.5 percent.

14 THE COURT: So, why -- so, the spread that you're
15 talking about here is probably eaten up by continuing to
16 litigate over that issue.

17 MR. TEECE: Your Honor, look, on remand --

18 THE COURT: So, I can see why they would have
19 settled it.

20 MR. TEECE: -- but on remand from the Second
21 Circuit Court of Appeals, the --

22 THE COURT: They cited it, basically, for the
23 proposition that I'm not bound by 9 percent.

24 MR. TEECE: That's correct. That's correct.

25 THE COURT: But as far as picking a rate, I don't

1 think it's particularly instructive because again, I mean,
2 you're going to settle that. Anyone would settle that, over
3 \$2 million dollars. Why would you spend -- the difference
4 on a point of interest or two on \$2 million dollars is going
5 to get eaten up with the attorneys' fees of litigating it.

6 MR. TEECE: But Your Honor, they took the case to
7 the Second Circuit Court of Appeals.

8 THE COURT: Well, I know. They probably realized
9 that they were stupid in doing so.

10 MR. TEECE: They took the -- I -- the rate that
11 was agreed to in this case, Your Honor, on remand --

12 THE COURT: Right.

13 MR. TEECE: -- is ten times the rate that the
14 defendants are proposing, and this is their seminal case.
15 That's really kind of my point.

16 THE COURT: Well, all right, I understand -- I
17 have a problem with the T-bill rate, as you could probably
18 tell. I kind of -- I'm in agreement with Judge Glenn on
19 that point. It's a very low rate (indiscernible).

20 MR. TEECE: But Your Honor referred to the prime
21 rate as an alternative, and Judge Glenn employed the prime
22 rate, but it was 6 to 8 percent at the time when Judge Glenn
23 employed the prime rate.

24 THE COURT: Actually, yeah. It's 6 to 8 percent,
25 you're right.

1 MR. TEECE: I'm reading from Judge Glenn's
2 decision, Your Honor --

3 THE COURT: Yes, 6 to 8 percent. That was pre-
4 financial crisis.

5 MR. TEECE: Sure.

6 THE COURT: Yeah, no, I understand.

7 MR. TEECE: So, at 8.25 percent, he's 75 basis
8 points from the rate that we're asking for on Page 91. You
9 have three rates, one for each transfer, 6.58 and 8.25 --

10 THE COURT: Yeah, but he's not at all moved by the
11 9 percent, and again, this was in 2005 and 2006, so, it's a
12 much bigger spread from general borrowing rates.

13 MR. TEECE: The rate he was --

14 THE COURT: The "spread" meaning between the T-
15 bill rate and the -- the current T-bill rate at the time he
16 was doing this opinion in 2010, and the prime rate when the
17 transfers were made.

18 MR. TEECE: Your Honor, I note, to your point
19 earlier that some judges simply adopt the postjudgment rate,
20 he -- Judge Glenn's decision breaks out his prejudgment rate
21 and postjudgment rate amount --

22 THE COURT: No, I understand, I get that.

23 MR. TEECE: And he went to 8.25 percent when the
24 defendants were proposing spot 6.4 percent.

25 THE COURT: Right.

1 MR. TEECE: And the postjudgment interest -- the
2 Federal postjudgment interest rates on the dates of the
3 transfers were 3.76 percent and 4.9 percent. I'm reading
4 from Page 90 of the decision. So, he went far over what
5 Your Honor has mentioned was the prime rate in question for
6 us.

7 THE COURT: Okay. But yeah, of course, it was a
8 different time, before the financial crisis.

9 MR. TEECE: But now we're going back to my point,
10 which is that -- which is that the fluctuations of the
11 public debt markets are not controlling, for purposes of
12 prejudgment interest.

13 THE COURT: What, with the fluctuations of the
14 markets themselves? I -- this is -- it's almost -- I think
15 you can only do rough equity here. That's basically what I
16 come down to. And the context is important, I think. I
17 think it is important to figure out how much of a New York
18 context there is to it. I think that is an element. How
19 much of a Federal context. What the remedial purpose is.
20 How -- you know, I think there is a clear remedial purpose
21 in stopping people from violating the automatic stay or
22 doing an intentional fraudulent transfer or sending a ship
23 to the wrong place on purpose. You know, those are all,
24 pretty much, you know what you're doing there.

25 Obviously, the decisions that the defendants made

1 here were conscious, but I'm not sure they were pretty
2 clearly wrongful.

3 MR. TEECE: Yeah, but again, this goes back to my
4 point, Your Honor, is that they don't have to engage in
5 wrongful conduct for the 9 percent to apply --

6 THE COURT: No, but --

7 MR. TEECE: -- it doesn't have to be about bad
8 faith --

9 THE COURT: I understand, but this case refers to
10 a remedial purpose, and I think that includes the notion
11 that you want to stop people from doing something. Because
12 otherwise, it's just compensation, and that's already
13 covered in the first factor.

14 MR. TEECE: Well, I mean, the --

15 THE COURT: And I don't know if I -- we should be
16 stopping people from asserting the meaning of a contract.

17 MR. TEECE: No, your -- well, Your Honor,
18 presumably, the Legislature, when it passed the 9 percent --

19 THE COURT: No, no, that's New York. We're not
20 covered by New York.

21 MR. TEECE: Well, we are --

22 THE COURT: It's just a factor.

23 MR. TEECE: The plan was covered by New York. The
24 plan was confirmed --

25 THE COURT: No, but you -- but you've already

1 said, New York law is not controlling here. It's just a
2 factor.

3 MR. TEECE: Your Honor --

4 THE COURT: I'm not -- I'm not -- the first thing
5 you said today was, I'm not required to apply 9 percent. I
6 inferred from that, that that means that New York law is not
7 necessarily the applicable law here. In fact, it isn't.
8 It's Federal law.

9 MR. TEECE: All right, so, the final point I would
10 make, Your Honor, and then I will sit down and ask, perhaps,
11 if (indiscernible) on rebuttal, if appropriate --

12 THE COURT: Okay.

13 MR. TEECE: -- is that, to the extent -- I
14 respectfully submitted, the prime rate, if it is in the
15 threes, is not an appropriate rate, given what the company
16 in question was receiving in connection with the debt that
17 it issued at the time, and I -- those amounts are for --
18 Your Honor doesn't have to get -- I cite you to the indices
19 at 8 percent and the equity indices. The unsecured debt
20 that the company was issuing was in the 4 percent range.
21 I'd submit that those creditors were better-positioned than
22 our creditors, so -- and that is above the prime rate at the
23 time, so I --

24 THE COURT: Okay.

25 MR. TEECE: Thank you.

1 THE COURT: Thanks.

2 MR. FRIEDMAN: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. FRIEDMAN: Edward Friedman, Friedman Kaplan
5 Sadler and Adelman for the defendants. There are a few
6 bullet points I'd like to articulate so we have them in the
7 record and obviously, I'm prepared to answer any questions
8 Your Honor has.

9 THE COURT: Okay.

10 MR. FRIEDMAN: First, to the extent that New York
11 law is a factor, I think it's important to note that the
12 CPLR provision, § 5001(a) specifically provides that in an
13 action of an equitable nature, interest and the rate and
14 date from which it shall be computed shall be in the Court's
15 discretion.

16 THE COURT: Right.

17 MR. FRIEDMAN: So that, even in a case under New
18 York law where, as here, the action is of an equitable
19 nature, the New York courts would have discretion.

20 THE COURT: Although it's a little different than
21 ordering specific performance and just compensating people
22 for the delay in it. I mean, it's -- here, it's payment of
23 money.

24 MR. FRIEDMAN: I understand that, but -- and that
25 discretion, however, which of course, Your Honor has under

1 Federal law, that discretion is accorded to New York state
2 courts, under New York state courts --

3 THE COURT: But I think everyone agrees that I
4 have discretion here.

5 MR. FRIEDMAN: Yes. And with respect to Your
6 Honor's exercise of discretion, the factors are set out in
7 numerous of the cases cited by both parties. The first
8 factor is, and I'm quoting from one of the cases: "the need
9 to fully compensate the wronged party for actual damages
10 suffered." First point I'd like to make about that is,
11 compensation for the plaintiffs is, in part, a function of
12 market conditions. We now are in an environment when
13 interest rates happen to be low. What constitutes full
14 compensation for a plaintiff in a low-interest rate
15 environment is different from what constitutes full
16 compensation in a higher interest rate environment. And the
17 Second Circuit has actually said this repeatedly in the
18 cases that the parties have cited, the Second Circuit has
19 said, generally, the prejudgment interest shall be measured
20 by interest on short-term, risk-free obligations.

21 THE COURT: Right.

22 MR. FRIEDMAN: Namely --

23 THE COURT: That's the Till concept.

24 MR. FRIEDMAN: -- and they're referring to --
25 right, the Treasury bill or the postjudgment rate, which

1 Federal courts often apply.

2 THE COURT: Although, again, I think that the same
3 logic that says that full compensation for actual damages in
4 a low-interest rate environment argues against applying a
5 rate that, albeit, it may be required under state law, you
6 can flip that over and say that, where a statutory rate is
7 lower than what is generally recognized to be a risk-free
8 rate is also -- you know, you also look at that rate with a
9 grain of salt, too.

10 MR. FRIEDMAN: Well, I think the -- when the
11 Second Circuit said --

12 THE COURT: i.e., T-bill rates are artificially
13 low or just not -- there's disconnect between the market and
14 T-bill rate, then you don't -- you know, when you have
15 discretion, you don't apply the T-bill rate.

16 MR. FRIEDMAN: I would just say, in the exercise
17 of your discretion, as a starting point, I would think, Your
18 Honor, we look at the T-bill rate because that is the
19 Federal postjudgment rate, and Federal courts often apply
20 that prejudgment. And I think deciding whether to apply the
21 postjudgment rate or something different, we get into the
22 factors that are available for Your Honor's consideration.

23 THE COURT: Right.

24 MR. FRIEDMAN: And I'd like to talk about how
25 those factors should be considered in the context of this

1 case, but there's actually just one other small point I'd
2 like to make first, so I don't lose it. In the reply brief
3 from the plaintiffs and in Mr. Teece's argument today, Your
4 Honor heard about Delphi's borrowing costs, and the reply
5 brief was submitted to the Court along with an exhibit that
6 was a Delphi 10K, reporting on bond issuances, credit
7 obtained by Delphi. And the simple point I'd like to make
8 is that, Mr. Teece and the plaintiffs in their brief, refer
9 to Delphi's borrowing cost with respect to bonds issued with
10 maturities of 5 to 30 years, and those borrowing costs for
11 Delphi with those maturities, are in the range of 3 to 4
12 percent, but the better comparison in thinking about
13 Delphi's borrowing costs are the references in the same
14 document, in the 10K, to Delphi's borrowing under a term
15 loan and revolving credit agreement where the borrowing
16 costs during the relevant period with a term of 3 to 4 years
17 is in the range of 2 percent. Even a little bit less than 2
18 percent.

19 THE COURT: Is that a secured loan or an unsecured
20 loan?

21 MR. FRIEDMAN: That would be an unsecured loan,
22 Your Honor. So, I mention that simply as a data point to
23 the extent Your Honor looks at Delphi's borrowing cost. We
24 think those would be the relevant costs to consider. Now,
25 the biggest question, I believe, for the Court is to

1 consider the particular circumstances of this case, because
2 we know from the briefing here, that the Federal courts have
3 broad discretion and every case is decided on its facts,
4 based on, how do we compensate the plaintiff, what's the
5 remedial purpose, and the other factors enumerated. And I
6 can find cases with the very low interest rates, Mr. Teece
7 can find cases with higher interest rates. The question is,
8 what is an appropriate exercise of the Court's discretion in
9 this case?

10 Now, I appreciate that Mr. Teece said, in the
11 argument today, that there's no accusation of bad faith
12 aimed at the defendants. I don't believe that the
13 plaintiffs' papers, in fact, accuse the defendants of bad
14 faith. I think, just the opposite is true and I think this
15 is directly relevant to thinking about what is appropriate
16 in this case. So, here, we have a situation where the Court
17 has ruled -- obviously, the Court has ruled against Delphi
18 on the plaintiffs' summary judgment motion, but the Court
19 ruled that, upon reading the words of the relevant
20 agreements, Delphi had the superior construction. And the
21 significance of that, Your Honor, is that, when we step back
22 and think about, what could Delphi have done, what should
23 Delphi have done, in thinking about whether the payment to
24 the unsecured creditors has come due. We have a situation
25 where a fair reading, a superior reading of the words of the

1 agreement would be that the payment has not yet become due,
2 and that certainly has been Delphi's reading. It's not a
3 litigation strategy. It's the reading of the words of the
4 agreement, which, even though the Court has ruled against
5 Delphi, the Court has stated, is the superior reading of the
6 words of the agreement.

7 And second, when we think about Your Honor's
8 reasons for deciding against Delphi and granting plaintiffs'
9 motion for summary judgment, I think those reasons
10 illustrate how it would have been unreasonable to even
11 expect Delphi to consider the possibility of making the
12 payment earlier, prior to a ruling by the Court, because a
13 public -- Delphi's a public company, but this would apply
14 even if it weren't a public company, but it's a public
15 company, has a Board of Directors, it has shareholders. The
16 Board of Directors reads the agreement, the Board of
17 Directors has the same interpretation of the words of the
18 agreement as Your Honor. When the Board of Directors could
19 not have done was to come to the conclusion that Your Honor
20 came to for the reasons that Your Honor came to. That just
21 was not reasonable for the Board.

22 THE COURT: Well --

23 MR. FRIEDMAN: It would have --

24 THE COURT: -- you could have talked to the people
25 who were at the hearing and then say, what was the deal?

1 MR. FRIEDMAN: Well, Your Honor --

2 THE COURT: But I understand your point. There's
3 a written document, so they have to deal with that, too.

4 MR. FRIEDMAN: And in terms of talking to the
5 people at the hearing, although Mr. Teece has disparaging
6 things to say about various parties, the fact is that the
7 parties at the hearing did not discuss the issue that is
8 presented to the Court in this case.

9 THE COURT: Well, that's where we disagree, but I
10 do -- I do agree with you that, in terms of general
11 considerations of whether the defendants here were using the
12 fact that they had the money, to, in essence, exert undue
13 leverage on the other side or you know, jerk them around,
14 knowing the time value of money was out there, I don't see
15 that here.

16 MR. FRIEDMAN: Okay. Your Honor, I just have to
17 correct one thing I said. The term loan and revolver were
18 secured.

19 THE COURT: Okay.

20 MR. FRIEDMAN: The five-year note bond issued by
21 Delphi that was unsecured had a rate of 3.15 percent --

22 THE COURT: Okay.

23 MR. FRIEDMAN: -- and that was unsecured
24 borrowing. That's all I have, subject to any questions that
25 Your Honor has.

1 THE COURT: Okay. All right. Anything else?

2 MR. TEECE: Just 30 seconds, Your Honor.

3 THE COURT: Sure.

4 MR. TEECE: So, the -- I was going to make the
5 point about the note. Those that I've mentioned, the 4.15
6 percent, 4.4, 3.15, 4.25, were all unsecured notes. And
7 just lastly, I --

8 THE COURT: These are higher rate for longer-term
9 debt, like ten-year debt?

10 MR. TEECE: I don't know the maturities, exactly,
11 but I think the point about the 2 percent, which is closer
12 to --

13 THE COURT: No, no, I understand -- I understand
14 that.

15 MR. TEECE: -- is a secured loan, I mean, that's -
16 -

17 THE COURT: Right, right.

18 MR. TEECE: -- and that's close to the -- the 2
19 percent is close to the prime rate.

20 THE COURT: There's a pretty big spread between
21 3.1 and the 5, and I'm assuming that that's because there's
22 either a subordination agreement or there's a -- you know,
23 it's a 20-year note or something like that.

24 MR. TEECE: Well, they were issued at different
25 points in time, actually. The --

1 THE COURT: Okay. All right.

2 MR. TEECE: -- the 4.15 I think is 2014 -- or no --
3 - actually, I have the --

4 MR. FRIEDMAN: Your Honor, I have all the dates
5 and rates.

6 MR. TEECE: The issue date is relevant, I think
7 the 4.15 is 2014, the 3.15 and the 4.4 issued at the same
8 time in 2016, I think -- in March of 2015, rather, or -- or
9 November of 2015 --

10 THE COURT: All right.

11 MR. TEECE: -- and then the September 2016 --

12 THE COURT: They're probably pretty close to the
13 prime rate, though, with a slight bump up. That's my guess.

14 MR. FRIEDMAN: Well, it's also --

15 THE COURT: Just, you know, off of the top of my
16 head --

17 MR. FRIEDMAN: Your Honor, the --

18 THE COURT: -- in each case.

19 MR. FRIEDMAN: The term is important, as Your
20 Honor noted, because the five-year note is at 3.15 percent.
21 The ten-year note is at 4.15 percent. Eleven years, 4.25
22 and 30 years, 4.40.

23 THE COURT: By those -- those last three all were
24 recent issuances?

25 MR. FRIEDMAN: The -- no, it's not. The five-year

1 note was issued November 2015, 3.15 percent. The ten-year
2 note was March 2014, 4.15 percent. The eleven-year was
3 November 2015, 4.25, and the thirty-year was September 2016,
4 4.40 --

5 THE COURT: All right.

6 MR. FRIEDMAN: -- just so the facts are in the
7 record.

8 THE COURT: That's fine. Okay. All right. Okay.

9 MR. TEECE: Just going back to the remedial
10 purpose, Your Honor, the Court's decision looked at,
11 obviously, New York law in interpreting the agreement,
12 looked at context, which New York law entitles the Court to
13 do, and then that context was the doorway into facts and
14 circumstances surrounding the confirmation of the plan. The
15 plan that was negotiated by unsecured creditors and our
16 clients, some were legacy holders of claims at the time,
17 some acquired their claims (indiscernible). The plan that
18 was negotiated by Creditors' Committee had a contingent
19 right to recovery, and that was the settlement of their
20 objection to the plan. The plan was confirmed under 1129,
21 and that was their bargain. Their bargain was, if the
22 company turns around, we get a contingent right to recovery.

23 And in bringing the lawsuit, having demanded the
24 company pay the distribution in November 2014 as they pose
25 up to 7.2 and having been rebuffed at that, plaintiffs

1 brought the lawsuit to vindicate their rights under that
2 plan, and to assert and realize their rights under the plan
3 that the Court had confirmed in a way that was consistent
4 with the way the Court -- the plan was confirmed. So, there
5 is a Chapter 11 purpose that's being advanced by plaintiffs
6 that are vindicating their rights under the plan.

7 The final point I would make, and this is the
8 final point, Your Honor, the defendants argued that the
9 Treasury rate is the starting point of the analysis and I
10 would just -- I'm reading now from the Jones v. Unum Life
11 Insurance Company, this is a Second Circuit case, 223 F.3d
12 130 -- 139, it says that: "The suitability of that
13 postjudgment rate for an award of prejudgment interest will
14 depend," because Your Honor asked about this question, "on
15 the circumstances of the individual case, and the court need
16 not limit the award of prejudgment interest to the rate at
17 which the injured party would have lent money to the
18 government." That's the T rate. "The court may, for
19 example, consider whether the plaintiff would have invested
20 the money at some higher rate..." "or it may take into
21 account the rate of interest the defendant would have had to
22 pay to borrow the money if it had withheld from the
23 Plaintiff."

24 So, the idea that the -- we start at the T rate
25 and we cap out at 9 percent if we can show bad faith, that's

1 -- we respectfully disagree with that narrative and the
2 construct of the goalposts for this issue.

3 THE COURT: Okay.

4 MR. FRIEDMAN: Your Honor, very, very briefly, a
5 year after the case mentioned by Mr. Teece, the Second
6 Circuit said that interest is intended to -- and this is
7 cited in our brief, New York Marine and General Insurance
8 Co., 266 F.3d 112 at 131, quote, "Interest is intended to
9 make the injured party whole, and generally should be
10 measured on interest on short-term, risk-free obligations."
11 And I mention that --

12 THE COURT: But there's no presumption in favor of
13 one of the other -- either the 9 and applicable and -- a
14 rate that would be applicable if this were governed by state
15 law or the Federal postjudgment rate. There's no
16 presumption in favor of one or the other.

17 MR. FRIEDMAN: I don't think the Court's talking
18 in terms of presumptions, but --

19 THE COURT: Right.

20 MR. FRIEDMAN: -- to the extent that Mr. Teece is
21 arguing for 9 percent or the prime rate, those are higher
22 than what would be --

23 THE COURT: It's supposed to be a safe investment.
24 A safe -- well, it depends on how long you wait. I mean, if
25 the lawsuit goes on ten years, I don't think it should be a

1 short-term investment. If you're waiting 9 months to get
2 the answer, it's probably a short-term investment.

3 MR. FRIEDMAN: Well, and here we're talking about
4 two years from the date --

5 THE COURT: Two, two and a half years.

6 MR. FRIEDMAN: -- the first payment was due --

7 THE COURT: Yeah.

8 MR. FRIEDMAN: -- to the judgment and --

9 THE COURT: Right.

10 MR. FRIEDMAN: -- the Second Circuit is not simply
11 saying a safe investment, it says the interest should be
12 measured by interest on short-term, risk-free obligations.

13 THE COURT: Right.

14 MR. FRIEDMAN: Thank you.

15 MR. TEECE: Thank you, Your Honor.

16 THE COURT: Although, what the Supreme Court has
17 said as far as risk-free obligations in the bankruptcy
18 context, and of course, Delphi is out of bankruptcy, is
19 prime plus some risk factor of between one and three because
20 it's not a bank. And it's an emerged -- it's a company
21 emerging from bankruptcy. It's different (indiscernible).

22 MR. FRIEDMAN: Right, but when you can -- we have
23 in the record Delphi's creditworthiness and its actual
24 borrowing cost.

25 THE COURT: Yeah. That's true. I agree. All

1 right.

2 MR. TEECE: Do we have its creditworthiness? We
3 have its borrowing cost, but do we have its creditworthiness
4 in the record? I didn't know --

5 THE COURT: Well, I mean, some smart people lent
6 it money, obviously, for --

7 MR. TEECE: Okay, but we have rates? We have
8 rates --

9 THE COURT: -- at the rates that are in the
10 record.

11 MR. TEECE: -- okay, thank you.

12 MR. FRIEDMAN: Right, exactly.

13 MR. TEECE: It's reflected (indiscernible).

14 THE COURT: So, for what that's worth. All right,
15 I have before me, as I said at the start of this hearing,
16 the remaining issue, as far as I'm concerned, in this
17 adversary proceeding, which is whether I should award
18 prejudgment interest to the plaintiffs, having already
19 concluded in a formal bench ruling that they are entitled to
20 the unsecured distribution under the Debtors' Chapter 11
21 plan. And if I conclude that they're entitled to
22 prejudgment interest, what the proper rate of that interest
23 should be.

24 The parties spent a fair amount of time arguing
25 whether I should be bound by -- or whether or not I am bound

1 by the New York State statutory interest rate, which except
2 in the case of judgments based on equity, is 9 percent for
3 all purposes, or rather, whether, instead, I am bound by the
4 Federal law regarding prejudgment interest, which provides
5 for fairly broad discretion to the trial court. For that
6 proposition, see Mendez v. Teachers Insurance and Annuities
7 Association, 92 F.2d 783 (2d Cir. 1992) and In re 1031 Tax
8 Group, LLC., 439 B.R. 84,87 (Bankr. S.D.N.Y. 2010).

9 If it wasn't clear before, and I think it probably
10 was clear, at oral argument, the plaintiffs made it crystal
11 clear that they are not arguing that I must, as a matter of
12 law, apply the New York State 9 percent statutory rate. To
13 me, that leads to the very clear inference that I am
14 governed by the Federal case law, because there's no
15 statutory -- there's no Federal statute that governs here
16 regarding the award of prejudgment interest. It's either
17 State or Federal law, after all, and the plaintiffs have
18 clarified that they are not saying that State law requires
19 the imposition of 9 percent New York State prejudgment
20 interest.

21 For the record, I, independently, have reached
22 that conclusion, given the nature of the action before me.
23 I appreciate that there is one case recorded which takes the
24 view that in enforcing the terms of a Chapter 11 plan,
25 including under 11 U.S.C. § 1142(a), the Court is governed

1 by State contract law, including the law pertaining to
2 prejudgment interest. See *In re Pearson Industries, Inc.*,
3 152 B.R. 546 557-60 (Bankr. C.D. Ill. 1993). However, I
4 think the analysis is more nuanced than that court applied
5 in that context, in which it found that there would be no
6 interest whatsoever owing on a prejudgment basis, because
7 for the type of action involved, there was an issue there,
8 there was no governing Illinois law that would have provided
9 for prejudgment interest.

10 Rather, I believe that while interpretation of a
11 plan is generally governed by the applicable law of the
12 state where the plan was confirmed, or the choice of law
13 provisions within the plan, the governing law for enforcing
14 a right under a plan may well, and probably is, viewed as an
15 issue of Federal law. Even on the first proposition, there
16 are courts that take the view that Federal common law
17 contract interpretation should apply in construing the
18 Chapter 11 plan, see, for example, the discussion in *In re*
19 *Tres Hermanos Dairy, LLC*, 2014 Bankr. LEXIS 198, 19-20
20 (Bankr. D.N.M. January 16, 2014). Most courts say that, for
21 interpretation purposes, you would apply general principles
22 of the state where the plan was confirmed, or the plan's
23 choice of law provision. And that's what I've generally
24 done in this case, including in *in re DPH Holdings, Corp.*,
25 553 B.R. 20 (Bankr. S.D.N.Y. 2016), at 25 note 7.

1 But, it has been held, and I think cogently, that
2 a cause of action for enforcement of a confirmed plan is
3 Federal in origin, notwithstanding that an interpretation of
4 the plan may require an application of state law contract
5 principles. See Booth Oil Site Administrative Group v.
6 Safety-Kleen Corp, Kleen is K-L-E-E-N, 532 F.Supp. 2d 477,
7 515 (W.D.N.Y. June 29, 2007)and Simonetti Development, Ltd.
8 v. Hillard Development Corp. (In re Hillard Development
9 Corp.), 238 B.R. 857, 872 (Bankr. S.D. Fla. 1998).
10 Moreover, here, the Federal bankruptcy context was critical
11 to the Court's decision on the merits of the summary
12 judgment motion, and specifically with respect to the
13 equivalent of a disclosure statement, which was the
14 disclosure or lack thereof, regarding the position taken by
15 the defendants in this action at the time that amended plan
16 was proposed and described to parties in interest, including
17 at the confirmation hearing.

18 That context is unique in the bankruptcy area and
19 has been recognized as cutting off parties' rights to assert
20 positions that are contrary to what was laid out to a court
21 and parties in interest in a bankruptcy case in the
22 disclosure statement or at confirmation or the equivalent.
23 See, for example, Adelphia Recovery Trust v. Goldman Sachs
24 and Co., 748 F.3d 110 (2d Cir. 2014), and Penberthy v.
25 Chickering, 2017 U.S. District LEXIS 6153 (S.D.N.Y. January

1 13, 2017). So, I believe, with regard to the issue of
2 whether interest -- prejudgment interest, that is, should
3 apply and how it should apply here, I should apply Federal
4 principles since, this present action, I believe, is
5 properly viewed as Federal in origin, particularly given the
6 basis for the Court's decision, which took into account, as
7 I believe must be the case, not only the language of the
8 contracts at issue but their bankruptcy context and what was
9 disclosed to the Bankruptcy Court and parties in interest
10 when the plan that incorporated those agreements was
11 confirmed.

12 That leaves the question, then, as to whether
13 prejudgment interest applies and if so, in what amount.
14 It's probably no surprise here that there's a wide
15 difference between the parties' positions on those issues.
16 The defendants take the position that it really shouldn't be
17 awarded at all, but, if it is to be awarded, it should be
18 awarded at the Federal postjudgment interest rate, i.e. the
19 short-term, T-bill rate, starting at the applicable time
20 when the payments are agreed to be owing, assuming the
21 validity of the Court's prior ruling on the merits.

22 The plaintiffs, to the contrary, contend that --
23 although I'm not bound to apply, under the choice of law
24 principles discussed, the New York State rate -- because
25 that rate is applicable to contract disputes in the state of

1 New York, which is where we are, and what I've been asked to
2 construe, I should apply that rate here.

3 As I noted, the Federal courts have broad
4 discretion on whether, and if so, in what amount, to award,
5 prejudgment interest. It is clear that, in exercising that
6 discretion, they're not bound by analogy to any particular
7 statute, and, further, that they should take into account,
8 in the context of the particular facts at issue, fairly
9 broad factors, which are, (1), the need to fully compensate
10 the wronged party for damages suffered, (2), considerations
11 of fairness and the relative equities of the award, (3), the
12 remedial purpose of the statute involved and/or (4) such
13 other general principles as are deemed relevant by the
14 Court. Wickham Contracting Company v. Local Union No.
15 3, International Brotherhood of Electrical Workers, 955 F.2d
16 831, 834 (2d Cir. 1992). "The purpose of prejudgment
17 interest is compensatory, not penal," close quote, United
18 States v. Seaboard Surety Company, 817 F.2d 956, 966 (2d
19 Cir. 1987).

20 The analysis is even more complicated here because
21 the \$300 million dollars that, over a several-month period
22 in 2015 should have been paid over for distribution to
23 Delphi's unsecured creditors, was, as I've just said, to be
24 paid over to a large group of unsecured creditors who
25 differed dramatically in terms of their own investment

1 profiles, goals, risk aversion or risk propensities and the
2 like. What might compensate one would not necessarily
3 compensate another, therefore -- in other words, it's not a
4 simple two-party dispute.

5 It is true that the Second Circuit, as noted by
6 the defendants, has also, perhaps in light of considerations
7 like that, stated that, generally speaking, the Court should
8 focus on what is a proper risk-free, short-term rate, albeit
9 that clearly must be governed by the facts of the situation,
10 i.e. the length of the litigation, the nature of the
11 parties, the nature of, in essence, the forced borrowing, et
12 cetera.

13 The other factors, before going back to the "fully
14 compensate" point, do not particularly argue for imposing a
15 rate beyond a reasonably fair risk-free rate, adjusted,
16 perhaps, to reflect the nature of the entity to which the
17 unsecured creditors were, in essence, making a forced loan.
18 And those factors, again, are considerations of fairness,
19 the relative equities of the award, the remedial purpose of
20 the statute involved, and such other general principles as
21 are deemed relevant by the Court. Well, there's no
22 particular statute involved here. This is not a case where
23 the automatic stay, which has a clear remedial purpose, is
24 being violated, for example. It's merely enforcing the
25 terms of a plan. One should not denigrate living up to the

1 terms of a Chapter 11 plan, but where there's a legitimate
2 dispute involved, the remedial purpose point is, I believe,
3 largely conflated with the first factor of full compensation
4 for actual damages suffered.

5 As far as the fairness and relative equities are
6 concerned, that factor is, in my view, also relatively
7 neutral here. The defendants, as I previously noted, have a
8 strong contractual, plain-language position, and one should
9 not clearly discourage parties from asserting their rights
10 under the apparent plain language of their contracts. On
11 the other hand, while I won't ask the defendants to
12 acknowledge this, I found, and I believe it's
13 incontrovertible, that the plain language of the statute as
14 asserted by the plaintiffs, makes no economic sense in the
15 context of this bargained-for right of the unsecured
16 creditors, and, moreover, was not -- whereas I believe it
17 should have been, if it was to apply -- revealed to the
18 other parties at interest or the Court at the time that the
19 plan was approved or noticed up to creditors.

20 So, I believe that neither side has much argument
21 to complain about the other taking a position that wasn't
22 warranted, or, more specifically, I don't find that the
23 defendants here used the fact that they had the money
24 improperly as a leverage point, or an improper leverage
25 point, during the course of this litigation. That still

1 leaves, however -- and I don't believe that any other
2 general principles that are relevant here -- so, that still
3 leaves the first and, frankly, I think, at least under these
4 facts, by far the most important point, which is the need to
5 fully compensate the wronged party for actual damages
6 suffered.

7 I think, given all the facts and circumstances, it
8 is proper to look at the issue here as one where the
9 plaintiffs, at a minimum, were making an, in essence,
10 coerced or forced loan to the defendant or defendants during
11 the roughly two years at issue, and they should be
12 compensated for making that forced loan by being paid what
13 someone who made a forced loan should be paid. They should
14 not, therefore, be compensated for an amount that's
15 materially above that amount, or based upon what they
16 themselves, or some of them, more aptly, could have done
17 with the money, i.e. investing it in the stock market, the
18 bond market, the horse races or anywhere else.

19 There is evidence in the record as to what the
20 company buyer's loans on an unsecured basis were during this
21 period, and that helps guide the Court, but, ultimately, I
22 think it is important to have a more general principal,
23 based upon a relatively riskless rate, as opposed to
24 focusing on individual loans here, which would open the door
25 for a much broader inquiry, if used here, as to the nature

1 and the subtext behind those loans and all of their
2 features, but rather also going forward into the -- for
3 future precedential purposes, inviting this inquiry to be
4 much more complicated than I believe the courts have treated
5 it. And I will state that, it appears to me that this bench
6 ruling is already about 75 percent longer than most of the
7 sections of opinions that deal with the prejudgment interest
8 issue ascribe to that issue, that I've read.

9 So, rather than take that approach, I will take a
10 cue from Judge Glenn in *In re 1031 Tax Group, LLC*, 439 B.R.
11 84 (Bankr. S.D.N.Y. 2010), and start with the prime rate in
12 effect during this period, as it would float during the
13 course of the period from the three dates that the parties
14 have agreed to, until the date of entry of the judgment.

15 The Supreme Court, in a somewhat different context
16 but frankly, quite similar, ultimately, to the directives
17 that the Second Circuit has focused on, at least initially
18 -- a short-term, risk-free rate -- has noted that, Debtors
19 that have emerged from bankruptcy have somewhat more of a
20 risk factor than banks do in lending to their prime
21 customers, and in the *Till* case, have, therefore, said
22 that, while one would start with the prime rate, one would
23 adjust it for a risk factor of between one and three
24 percent. I'm not doing exactly the same analysis here, but
25 in the exercise of my discretion, I believe it would be fair

1 to add another 1.5 percent to the prime rate on a floating
2 basis and have that be the rate that would apply here for
3 prejudgment purposes.

4 So, I'm going to ask counsel for the plaintiffs to
5 prepare a judgment consistent with my two rulings in this
6 case, the first one being granting their motion for summary
7 judgment on the merits and finding the unsecured creditor
8 distribution was owing on the agreed dates that are set
9 forth in the papers before me now, including on Page 6 of
10 the defendants' memorandum of law, and awarding prejudgment
11 interest from each of those dates at the rate that I've laid
12 out, as well as postjudgment interest at the Federal rate
13 under section 1961.

14 I had told you when I gave you my bench ruling
15 that I would give you a somewhat, hopefully, at least, more
16 complete ruling on the merits, and I still intend to do
17 that, but I won't be able to do that for about a month,
18 given my calendar. So, that's still to come, but you could
19 circulate the judgment in the meantime and submit it to
20 chambers and I expect that'll get entered in April.

21 Any questions about what to put in the judgment?

22 MR. TEECE: I don't think so, Your Honor, I --

23 THE COURT: Okay. Well, if there's some dispute
24 about it, you can send me dueling orders with an
25 explanation.

1 MR. TEECE: As I understand it, we have three
2 dates that we agree upon.

3 THE COURT: Right.

4 MR. TEECE: We need to identify the prime rate on
5 each of those dates and add 1.5 percent to that.

6 THE COURT: Yeah, but I had it fluctuates
7 thereafter. I had it to be floating so no one gets caught
8 with some sort of strange interest rate. That's the one --
9 that's the main problem with Till. It can catch you at an
10 anomalous point, whether too high or too low. This would
11 just follow it through. And I guess whenever, you know,
12 that's adjusted, generally under loan agreements, either
13 quarterly, semi-annually or annually.

14 MR. TEECE: Right. Okay, well, we'll take a look
15 at this --

16 THE COURT: If the company's already monitoring
17 that, you know, it's easily tracked. You just do it -- you
18 adjust it -- I guess you could adjust it annually, is my
19 thought. It hasn't moved that much over the last two years.
20 Mr. Friedman, do you have any --

21 MR. FRIEDMAN: Sorry. Your Honor, just first of
22 all, in terms of sequence, is it the Court's plan to issue
23 the judgment and the written decision --

24 THE COURT: Yeah, the judgment may come first.

25 MR. FRIEDMAN: Oh, the ju -- okay.

1 THE COURT: Yeah, I had hoped to have -- I'm going
2 to have an operation in a couple days --

3 MR. FRIEDMAN: Oh, sorry.

4 THE COURT: -- so I'm not quite sure of my
5 schedule. But so, you know, I'm assuming with \$300 million
6 dollars at stake, you're going to appeal. There will
7 certainly be a written opinion before the District Court
8 hears the appeal. I'm not going to hold up the judgment. I
9 would hope to have it in May. I mean, not the judgment. I
10 would hope to have the opinion in May. The judgment, you
11 can send to me and it'll get entered in early April, is my
12 sense.

13 MR. FRIEDMAN: And Your Honor, just, you know, for
14 the record, we think in terms of fully compensating the
15 plaintiffs, the idea of imposing a prejudgment rate for the
16 two years or so in question, that's above even Delphi's
17 long-term unsecured borrowing (indiscernible).

18 THE COURT: I don't know what it is. No one would
19 tell me what prime was, so I'm just going by what I think it
20 -- is generally.

21 MR. FRIEDMAN: No, we said, during the hearing
22 today --

23 THE COURT: Oh, oh, oh, yeah. Well, it may be or
24 it may not be, but I'm not going to put a cap on it. I
25 think that that's fair. The Supreme Court said it's fair

1 for people who are exiting Chapter 11 and have secured debt.

2 It's certainly fair for people who have unsecured debt.

3 MR. FRIEDMAN: But Delphi exited six years ago.

4 It's been borrowing at much lower levels since then,

5 unsecured.

6 THE COURT: Well, I don't know. No one would tell

7 me what prime is. It's borrowing at less than prime?

8 MR. FRIEDMAN: It's borrowing at about prime

9 because prime is --

10 THE COURT: Well, I don't know. No one would tell

11 me that.

12 MR. FRIEDMAN: I did, Your Honor, prime, I said

13 during the hearing, prime is about 3.25 percent.

14 THE COURT: I don't know what that's based on.

15 MR. FRIEDMAN: Well, I mean, that -- that's --

16 THE COURT: In any event, if it's 4, it's in

17 between the dates that you gave me -- the numbers you gave

18 me.

19 MR. FRIEDMAN: Yeah, but Delphi's longer-term

20 borrowing is under 4 percent.

21 THE COURT: It's fair. I believe it's fair. They

22 don't have a contract, the others have a contract. It's a

23 fair rule. It's certainly -- the Supreme Court was quite

24 confident it was fair in the Till context. That was for

25 secured loans. Okay.

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MR. TEECE: Thank you very much, Judge.

(Whereupon these proceedings were concluded at

2:13 PM)

I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

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